No. 94-562

In The

Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ET AL.,

Petitioners,

versus

SEVEN FALLS COMPANY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE MARITIME LAW ASSOCIATION IN SUPPORT OF PETITIONERS

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The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of Petitioners, Leslie Wilton, et al. Both Petitioners and Respondents have consented to the MLA's participation, and copies of the letters conveying such consent are being filed with the Clerk of the Court simultaneously with the submission of this brief.

INTEREST OF AMICUS CURIAE

The MLA has a strong interest in the disposition of this case. The MLA is a nationwide bar association, founded in 1899, and incorporated in 1993. It has a membership of more than 3,500 members, primarily attorneys practicing maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

The MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests – shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, stevedoring companies, passengers, marine insurance underwriters and brokers and other maritime plaintiffs and defendants.

The MLA's purposes are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation*, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

(Emphasis added.)

In furtherance of these objectives the MLA, during the ninety-six years of its existence, has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

The MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

The MLA has actively participated, as one of some fifty national maritime law associations constituting the Comite Maritime International,[4] in the movement to

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[1] 46 U.S.C. §§ 1300-1315.

[2] 9 U.S.C. §§ 1-16.

[3] *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 (7th rev'd ed. 1993) (hereinafter "BENEDICT"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

[4] These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Denmark, Egypt, Finland, France, Germany, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, D.P.R. Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Russian Federation, Sene-

achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

The MLA believes uniformity in maritime law, both national and international, is essential. Concern for uniformity has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

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gal, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States, Uruguay and Venezuela.

[5] *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913), *reprinted in* 6 BENEDICT, Doc. No. 4-1; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. No. 1-1; Collision (1910), *reprinted in* 6 BENEDICT, Doc. No. 3-2; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2; Maritime Liens and Mortgages (1967), *reprinted in* 6C BENEDICT, Doc. No. 15-5; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3; and Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4.

[6] MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

[7] MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

The MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including a number of briefs accepted by this Court.[8] It is the policy of the MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved or the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case which involves critical issues regarding the Declaratory Judgment Act. Declaratory judgments are an important tool in promoting uniformity of U.S. maritime law, and excessive abstention invites and endorses forum shopping and unpredictability in an area in which consistency is essential.

Apart from the inherent problems arising from uncertainty in the application of a federal door-closing measure, there is the risk that state courts will disregard other elements of admiralty law. *See, e.g., Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La.), *cert. denied*, ___ U.S. ___ (1992) (applying state strict liability statute to maritime tort). Moreover, the federal courts make and are best suited to enforce U.S. maritime law. Accordingly, the choice of plaintiffs to seek a declaration of their rights under U.S maritime law in federal court should be

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[8] *E.g., Sisson v. Ruby*, 497 U.S. 358 (1990); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

respected. In contrast, a proliferation of chaotically different results arising out of the same factual settings adversely affects the doctrine of uniformity and consequently the practices of the MLA members and the affairs of their clients.

STATUTES INVOLVED

United States Constitution, art. III, § 2[1].

> The judicial Power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction . . . [and] between Citizens of different states. . . .

28 U.S.C. § 2201(a). Declaratory Judgment Act.

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Federal Rule of Civil Procedure 4(k)

> (1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant
>
> * * *
>
> (B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues. . . .

SUMMARY OF ARGUMENT

"[F]ederal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred . . . [and] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 358, 109 S. Ct. 2506, 2512, 105 L. Ed. 2d 298, 310 (1989) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L. Ed. 257 (1821)). Maritime interests regularly invoke federal jurisdiction, seeking a remedy affirmatively guaranteed by Congress in the Declaratory Judgment Act ("the Act"), pursuant to constitutionally granted maritime jurisdiction. Lower courts have effectively denied these interests both their right to be in federal court, and the remedy which Congress has affirmatively supplied, ignoring legislative intent, and violating the constitutionally mandated separation of powers between the legislature and the judiciary.

The Declaratory Judgment Act is intended to permit litigants an opportunity for judicial intervention before uncertainty regarding rights and obligations escalates into an affirmative breach of duty. Neither the Act itself, nor anything in its legislative history, permits a court having jurisdiction over the parties and issues to decline to hear a declaratory judgment suit. The district court's

decision to defer to a parallel state court action violates the purpose of the Act, and the clear intent of its framers.

District courts have not been afforded discretion to decline declaratory judgment cases, merely because it is more convenient to do so. The history of the Act, and its remedial nature, require federal courts to provide litigants, particularly maritime litigants, their day in court. The district court's discretion to abstain can only be exercised in light of the court's unflagging obligation to exercise jurisdiction. Only exceptional circumstances will justify abdication of valid jurisdiction. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800 (1976).

The Fifth Circuit's deference to the unfettered discretion of the district court has effectively obliterated a legislatively crafted remedy for maritime interests and for marine insurers in particular. The district court's "second in time preference" eliminates the efficacy of the Declaratory Judgment Act and penalizes any litigant who attempts to avail itself of the protections of the Declaratory Judgment Act before a dispute ripens into litigation. These decisions are contrary to the important principle of uniformity in maritime law, and remove maritime cases from the courts with the most experience and expertise to decide them.

ARGUMENT

I. The federal Declaratory Judgment Act has been a vehicle traditionally utilized by maritime interests in a variety of settings.

By its very nature, maritime commerce is transient. Vessels travel from port to port, state to state, country to

country. Seaman are injured, cargo is damaged, vessels collide in different ports, different states, and different countries. In a marine disaster, seamen from many different states or countries may be injured; oil or other cargo may be spilled, affecting the coastlines of several states; cargo belonging to interests both foreign and domestic may be damaged; a variety of insurance policies, both marine and non-marine may be implicated, placing at risk both foreign and domestic underwriters. Traditionally, in attempting conclusively to determine rights and remedies in the face of a marine disaster or a simple personal injury, admiralty interests have resorted to the federal courts, where Congress and the Constitution have expressly provided specific jurisdiction over matters maritime. These interests approach the federal court, frequently using the vehicle of the federal Declaratory Judgment Act, seeking a determination (i) of whether maintenance and cure is owed, or whether a seaman has reached maximum cure;[9] (ii) of general average;[10] (iii) of

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[9] *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 28 (CA5 1989); *Lady Deborah Inc. v. Ware*, 855 F. Supp. 871 (E.D. Va. 1994); *Franklin v. Diamond Offshore Management Co.*, 1994 WL 144288 (E.D. La., Apr. 18, 1994) (Civ.A.No. 93-3940); *First Shipmor Assn v. Musa*, 1993 A.M.C. 2007 (N.D. Cal. 1993); *Rowan Companies, Inc. v. Meyers*, 1993 WL 218239 (E.D. La., June 14, 1993) (Civ.A.No. 93-1330); *Great Lakes Dredge and Dock Co. v. Ebanks*, 1994 WL 703489 (S.D. Ga., Nov. 28, 1994) (Civ.A.No. CV294-109).

[10] *Ceramic Corp. of America v. Inka Maritime Corp. Inc.*, 1 F.3d 947 (9th Cir. 1993); *Waterman Steamship Corp. v. Chubb & Son, Inc.*, 1994 WL 50233 (E.D. La. 1994); *Insurance Co. of North America v. S/S CTE Rocio*, 1992 A.M.C. 2568 (S.D. N.Y. 1992).

limitation of liability;[11] (iv) of coverage or non-coverage under a marine insurance policy;[12] and (v) of the parties' rights regarding a maritime contract unrelated to insurance.[13]

It is not uncommon for a entity with an interest in a maritime disaster, be it an underwriter, a vessel owner, a ship charterer or an injured seaman, to file a pre-emptive suit, invoking the protections of a federal forum before a ship can sail away, even without knowing whether the

[11] *Sisson v. Ruby*, 497 U.S. 358 (1990); *Odeco Oil and Gas Co.*, 4 F.3d 401 (5th Cir. 1993); *Doucet & Adams, Inc. v. Hebert*, 1993 WL 8623 (E.D. La., Jan. 6, 1993) (Civ.A.No. 92-2375); *Complaint of Bird*, 794 F. Supp. 575 (D. S.C. 1992).

[12] *See Sirius Ins. Co. (UK) Ltd. v. Collins*, 16 F.3d 34 (2d Cir. 1993); *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94 (5th Cir. 1992); *Northwestern Nat. Ins. Co. v. Federal Intermediate Credit Bank of Spokane, Wash.*, 839 F.2d 1366 (9th Cir. 1988); *Windsor Mount Joy Mut. Ins. Co. v. Giragosian*, 864 F. Supp. 239 (D. Mass. 1994); *Homestead Ins. Co. v. Kim Hung, Inc.*, 1994 WL 518261 (E.D. La., Sept. 22, 1994) (Civ.A.No. 93-3677); *Newark Ins. Co. v. Blaire*, 1194 A.M.C. 1061, 1994 WL 4410 (S.D. N.Y., Jan. 3, 1994) (No. 92 Civ. 1648); *Homestead Ins. Co. v. Woodington Corp.*, 1993 A.M.C. 1552 (E.D. Va. 1992); *El Fenix de Puerto Rico v. Serrano Gutierrez*, 786 F. Supp. 1065 (D. P.R. 1991); *Washington International Ins. Co. v. Mellone*, 773 F. Supp. 189 (C.D. Cal. 1990).

[13] *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990); *Maritime Overseas Corp. v. Ebner*, 697 F.2d 701 (5th Cir. 1983); *Luckenbach S.S. Co. v. U.S.*, 312 F.2d 545 (2d Cir. 1963); *Great Lakes Dredge and Dock Co v. Ebanks*, ___ F.Supp. ___, 1004 WL 703489 (S.D. Ga. 1994); *Flagship Group, Ltd. v. Peninsula Cruise Inc.*, 771 F. Supp. 756 (E.D. Va. 1991); *Toxotix Compania Naviera, S.A. v. Shipalks Shipping A.G. Zug, Switzerland*, 1990 WL 63779 (S.D. N.Y. May 10, 1990) (No. 88 CIV 7308).

vessel or the vessel owner has any liability. Frequently, when vessels collide, or a vessel breaks apart, months will pass before any conclusive determination of fault can be made. Similarly, where injured seamen are paid maintenance and cure, the point at which the seaman reaches maximum cure is frequently disputed. Because of the transient nature of the marine industry, it is often necessary to obtain witness statements or depositions of crew members before a vessel leaves port, and U.S. waters.

This "pre-emptive strike" is an accepted, and acceptable, phenomenon in the world of maritime commerce. Frequently, it is the only way to obtain and maintain jurisdiction over a foreign shipowner whose vessel has caused damage in a U.S. port. The Declaratory Judgment Act provides litigants with an affirmative federal remedy to be used before a potential breach of contract ripens into an actual breach of contractual duty. *See Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28 (CA5 1989); *see also* S. Rep. No. 1005, 73d Cong., 2d Sess., at 3 (1934). The Declaratory Judgment Act traditionally has been a vehicle used by maritime insurers to avoid the potentially severe ramifications of denying an insured's claim, when valid grounds for doing so were present. *See, e.g., Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94, 97 & n.5 (CA5), *cert. granted*, ___ U.S ___, 113 S.Ct. 51 (1992), *cert. dism'd*, ___ U.S ___, 113 S.Ct. 1836 (1993); *Rowan Cos.*, 876 F.2d at 28; *American Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Ass.*, 743 F.2d 1519 (CA11 1984); *see also* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS §100, at 672 (1983); EDWIN BORCHARD, DECLARATORY JUDGMENTS 634-80 (2d ed. 1941). The courts below have effectively penalized litigants for "racing to the courthouse," disenfranchising parties who, for

valid reasons, seek affirmatively to avail themselves of the protections of the federal forum.

II. A federal court with maritime jurisdiction may not defer to a later-filed state court action, merely because of the pendency of a state court action.

The rulings of the courts below eviscerate the affirmative remedy provided by Congress in the Declaratory Judgment Act and ignore the clear congressional intent to provide litigants with a federal forum to resolve issues such as those presented in traditional maritime litigation.

A. Deference to a later-filed state court action is contrary to congressional intent and the affirmative character of the Declaratory Judgment Act.

Marine underwriters, unsure of their rights and duties under policies of marine insurance, frequently attempt to invoke the affirmative protection of the federal court.[14] More often than not, these federal actions are stayed, at the whim of the district judge, pending resolution of the later-filed state court action. This eviscerates the affirmative nature of the remedy provided by Congress, effectively abolishing the Declaratory Judgment Act and leaving marine underwriters without a federal remedy.

Deference to a later-filed state court action, simply because another forum is available, is inconsistent with

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[14] See cases cited n.12, *supra*.

the affirmative, remedial character of the right granted by Congress. Congress has not given district courts discretion to dismiss cases, merely because it is more convenient to do so. Rather, district courts have discretion to grant the relief sought, or to deny the relief sought, following a full trial on the merits. *See* S. Rep. No. 1005, 73d Cong., 2d Sess., at 2, 5 (1934).

B. The abstention doctrine does not permit the abdication of jurisdiction over a declaratory judgment action merely because of the pendency of a parallel state court action.

The decisions of *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942), *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), reinforced by this Court's recent decisions in *McCarthy v. Madigan*, 503 U.S. 140 (1992), and *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350 (1989), command a district court with valid jurisdiction to exercise that jurisdiction in declaratory judgment cases, except in the most exceptional circumstances.

Emphasizing the "unflagging obligation" to exercise jurisdiction, and that only the clearest of justifications would warrant abdicating that jurisdiction, this Court has directed lower courts to examine both choice of law and inadequacy of the state court proceeding in making an abstention decision. *Moses Cone*, 460 U.S. at 26, 28. Only "exceptional circumstances" will justify a district court's decision to stay a federal declaratory judgment action. *Id.*, 460 U.S. at 19. The mere pendency of a state court action

is not sufficient. Another aspect of this rule is that appellate courts should review *de novo* a district court's decision to abstain and not just review for abuse of discretion.

Moses Cone makes it clear that declaratory judgment actions must be viewed with the same unflagging obligation to exercise jurisdiction as is required with all other types of actions validly within federal jurisdiction. If district courts are permitted under any circumstances to stay declaratory judgment cases, that decision must be made within the limits prescribed by *Colorado River* and *Moses Cone*. *See also New Orleans Pub. Serv., Inc v. New Orleans*, 491 U.S. 350, 373 (1989) ("NOPSI") (reversing abstention decision where declaratory relief sought under federal law). Specifically addressing the issue of parallel actions in the state and federal systems, *NOPSI* recognized that, while the federal court's disposition of an action may affect or pre-empt a pending state action, "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." 491 U.S. at 373.

Colorado River abstention is essentially a doctrine of convenience. *See* Linda Mullenix, *A Branch Too Far*, 75 GEO. L.J. 99, 103 (1986). While this Court has affirmed the application of *Colorado River* abstention in certain circumstances, this type of abstention is not based on the same comity principles at stake in traditional abstention cases, which involve complex state regulatory schemes, or untested state court statutes. *Colorado River* abstention is concerned with "wise judicial administration;" in other words, management of the district court's docket. Accordingly, it is most important that exceptional circumstances exist.

In the Declaratory Judgment Act, Congress has provided litigants with an affirmative remedy; a remedy that by its very nature invites pro-active, pre-emptive litigation. A decision to abstain under *Colorado River* because of the pendency of a later-filed parallel state court action, except in the most exceptional of circumstances, thwarts the legislative purpose behind the jurisdiction statutes and the Declaratory Judgment Act. Marine interests, despite the invocation of a legislatively sanctioned federal remedy, are being forced to try federal maritime claims in state courts. Abstention decisions in admiralty cases, merely because of the invocation of the Declaratory Judgment Act, have effectively abolished an important aspect of federal admiralty jurisdiction. This judicial usurpation of the legislative function cannot be tolerated.

III. When questions of federal maritime law are at issue, federal jurisdiction is mandated.

Critical to the abstention equation is choice of law. *Moses Cone*, 460 U.S. at 23. "[T]he presence of federal-law issues must always be a major consideration weighing against surrender." *Moses Cone*, 460 U.S. at 26. Questions of marine insurance are controlled by federal maritime law. Marine underwriters, seeking a declaration of rights and responsibilities under policies controlled by federal law have a right to proceed before a federal tribunal. Actions under the Limitation of Liability Act, 46 U.S.C. § 183c, are also commonly brought under the Declaratory Judgment Act. *See Sisson v. Ruby*, 497 U.S. 358 (1990); *Odeco Oil and Gas Co. v. Bonnette*, 4 F.3d 401 (CA5 1993); *Doucet & Adams, Inc. v. Hebert*, 1993 WL 8623 (E.D. La.,

Jan. 6, 1993) (Civ.A.No. 92-2375); *Complaint of Bird*, 794 F. Supp. 575 (D. S.C. 1992).

Because of the special need for predictability and reliability of rights and obligations in maritime commerce, the Admiralty Clause places maritime law and jurisdiction within the "judicial Power of the United States. . . . " U.S. CONST., art. III, § 2, cl. 3. The principle mandating uniform treatment of maritime cases is not a vacant theoretical requirement, but rather was designed to afford fairness to all maritime litigants by having their conduct and rights governed by the same rules:

> [T]he convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. . . .
>
> One thing, however is unquestionable: The Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intent to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875).[15]

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[15] *See Carnival Cruise Lines Inc. v. Shute*, ___ U.S. ___, ___, 111 S.Ct. 1522, 1528, (1991) (upholding forum clause in a non-negotiated passage adhesion contract, because cruise ships have a right to protect themselves from the prospect of being forced to face lawsuits in a multitude jurisdictions).

While this Court has allowed state law to intrude on matters of marine insurance, the circumstances are not unlimited. Considerable interest in uniformity is preserved under *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316-21 (1955). While the Maritime Law Association and other interested parties have advocated legislative refinement of the *Wilburn Boat* progeny, neither this Court's pronouncement nor any circuit law has abolished the doctrine of uniformity with regard to marine insurance.

As Justice Frankfurter observed in his concurring opinion in *Wilburn Boat*, nowhere is the need for uniformity greater than in the area of marine insurance:

> The business of marine insurance often may be so related to the success of many manifestations of commercial maritime endeavor as to demand application of a uniform rule of law designed to eliminate the vagaries of state law and to keep harmony with the marine insurance laws of other great maritime powers.

348 U.S. at 323 (citations omitted).

Since this Court's decision in *Wilburn Boat*, marine underwriters have been faced with mounting uncertainty regarding the standards to which they, and their assureds, will be held. Except where a construction is "firmly entrenched" maritime law, *Wilburn Boat* directs the application of state law to the interpretation of marine insurance policies. *Wilburn Boat*, 348 U.S. at 316-21.

The magnitude of unpredictability created by *Wilburn Boat* is enormous, for the making of a marine insurance agreement commonly involves international as well as interstate activities; and the ship's sphere of operations and the origins and ties of an injured person add further geographical contacts.[16] Parties to maritime endeavors not only cannot predict whether federal maritime law or state law will apply to their insurance rights and obligations, but also are confronted with the additional uncertainty of which state may be deemed to have the "greatest interest in the resolution of the issues." *Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666, 669 (CA5 1992); *accord, Illinois Constructors Corp. v. Morency & Associates, Inc.*, 802 F. Supp. 185, 188 (N.D. Ill. 1992) (citing cases), *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882, 890-91 (CA5), *cert. denied*, ___ U.S ___ (1991).

In view of the global nature of maritime commerce and the variety of parties in insurance cases, it is difficult to determine which state or even which nation may ultimately be found to have the greatest interest. Moreover, the state with the greatest interest may decline to intrude its domestic regulations into the field of marine insurance

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[16] As observed by a district court: "Bearing in mind that ships, fishing vessels in particular, often operate in the waters of several or many states, to allow for different standards of coverage where trading limits have been breached according to where a vessel sank, or where the insurance policy providing coverage was issued, etc., would have a severely deleterious effect on uniformity in maritime law." *Lexington Ins. Co. v. Cooke's Seafood*, 686 F. Supp. 323, 328 & n.7 (S.D. Ga. 1987), *aff'd*, 835 F.2d 1364 (CA11 1988), *quoted with approval in Port Lynch, Inc. v. New England International Assurety of America, Inc.*, 754 F. Supp. 816 (W.D. Wash. 1991).

by specifically excluding marine insurance from its insurance regulations and providing that general maritime law is to govern such issues. *See, e.g., Lexington Ins. Co. v. Cooke's Seafood*, 686 F. Supp. 323, 328 (S.D. Ga. 1987), *aff'd*, 835 F.2d 1364 (CA11 1988); *Miller v. American Steamship Owners Mutual Protection and Indemnity Co.*, 509 F. Supp. 1047, 1049-52 (S.D. N.Y. 1981).

For example, the California legislature has specifically incorporated the traditional marine insurance concept of *uberrimae fidei* into its insurance code. Decisions in the Ninth Circuit, accordingly, regardless of whether a policy is construed according to general maritime or state law, are consistent with traditional marine concepts. The Fifth Circuit, on the other hand, has held that *uberrimae fidei* is no longer a traditional marine concept, and always applies state law. *Albany Insurance*, 927 F.2d at 890. Thus within the Fifth Circuit, the construction of a marine insurance policy may differ, depending on whether the lawsuit is filed in a federal district court in Texas or in Louisiana or in Mississippi.

Under English law, *uberrimae fidei* is the controlling requirement in the formation of a marine insurance contract: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party." The Marine Insurance Act, 1906, 6 Edw., Ch. 41, § 17 (Eng.). The English statute requires that the "assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured. . . . If the assured

fails to make such disclosure, the insurer may avoid the contract." *Id.* § 18.

Federal maritime law, particularly where marine insurance is concerned, is intended to follow the fortunes of English decisions, and is virtually identical to English law. *Queens Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924); *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 442-43 (1953); *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866, 870 (CA2 1985); *see also Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 694-5 (CA11 1984), *modified*, 779 F.2d 1485 (CA11 1986); *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 980-82 (CA5 1969); *Royal Ins. Co. of America v. Cathy Daniels, Ltd.*, 684 F. Supp. 786, 790 (S.D. N.Y. 1988); *Reliance Knight v. U.S. Fire Ins. Co.*, 651 F. Supp. 477, 481 (S.D. N.Y.), *aff'd.*, 804 F.2d 9 (CA2 1986), *cert. denied*, 480 U.S. 932 (1987); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 55-56 (2d ed. 1975).

Marine insurance, by its very nature, requires consistent application. The entire shipping industry has a strong need for uniformity in coverage. Neither the interests of the insured ship nor of marine underwriters are served if coverage under a particular policy changes as a ship moves from jurisdiction to jurisdiction. If there is no consistency in the application of maritime law to marine insurance, policy interpretation will vary state to state.

It is anathema to the doctrine of uniformity to have an insured ship sail in and out of *uberrimae fidei* jurisdiction as it moves from Pascagoula to New Orleans to Port Arthur (a distance of little more than three hundred

miles). Furthermore, the Admiralty Clause does not countenance such a lack of uniformity between the law applied in the Fifth and the Ninth Circuits. To compound the lack of uniformity in current Fifth Circuit law, deprivation in the Fifth Circuit of a declaratory judgment mechanism to determine marine coverage obligations leaves insurers with absolutely no federal rights. State courts asked to apply traditional maritime concepts to coverage adjudication have had little impetus to do so. The Fifth Circuit has now sanctioned not only the abandonment of substantive federal law but has thrown marine insurers to the vagaries of state court adjudication by foreclosing the declaratory judgment mechanism for adjudication of coverage before a neutral federal forum. *Granite State*, 986 F.2d at 97 & n.5.

Similarly, the federal courthouse doors have been all but closed to the scores of maintenance-and-cure cases, merely because the employer has invoked the Declaratory Judgment Act. *See, e.g., Torch v. LeBlanc*, 947 F.2d 193, 196 (CA5 1991); *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 28 (CA5 1989); *Lady Deborah Inc. v. Ware*, 855 F. Supp. 871 (E.D. Va. 1994); *Franklin v. Diamond Offshore Management Co.*, 1994 WL 144288 (E.D. La., Apr. 18, 1994) (Civ.A.No. 93-3940); *First Shipmor Assn v. Musa*, 1993 A.M.C. 2007 (N.D. Cal. 1993); *Rowan Companies, Inc. v. Meyers*, 1993 WL 218239 (E.D. La., June 14, 1993) (Civ.A.No. 93-1330); *Great Lakes Dredge and Dock Co. v. Ebanks*, 1994 WL 703489 (S.D. Ga., Nov. 28, 1994) (Civ.A.No. CV294-109).

The marine industry, by its very nature, has a strong need for uniformity. Vessels cannot operate in a national or global economy if there is no consistency in the application of maritime law. Accordingly, abstention should

require even more exceptional circumstances in maritime cases.

IV. Because the federal court has greater expertise and resources with regard to maritime issues, maritime interests should be permitted to choose a federal forum for the resolution of complex maritime disputes.

The final factor identified in *Moses Cone* is the inadequacy of the state court proceeding. 460 U.S. at 26. Because state court competence and procedures are presumed adequate, an adequate state forum is not an "exceptional circumstance" mandating surrender of jurisdiction. *See Deakins v. Monaghan*, 484 U.S. 193, 203 (1988); *Stone v. Powell*, 428 U.S. 465, 493-94 n. 35 (1976); *see also* Akhil R. Amar, *Parity as a Constitutional Question*, 71 B.U. L. Rev. 645, 646 (1991); Erwin Chemerinsky, Comment, *Ending the Parity Debate*, 71 B.U. L. Rev. 593, 602-03 (1991).

The purpose of this inquiry is "not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional circumstances,' the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction." *Moses Cone*, 460 U.S. at 25-26. This factor does not require that the state forum be *in*adequate, in order to exercise jurisdiction, for an inadequate state forum *mandates* the exercise of federal jurisdiction. *Id.* at 26.

The federal courts have procedural advantages that the state courts cannot offer. The Supplemental Rules for Certain Admiralty and Maritime Claims are designed

specifically to address the special needs and concerns of the maritime community, and to insure uniformity of judicial proceedings in admiralty. Seizures are occasionally accompanied by an action for declaratory relief, such as when nonpayment for ship repairs, or for stores and provisions, is the subject of suit. The Rules on attachment and for actions in rem are peculiarly suited for the fluid nature of the maritime industry, with vessels travelling from port to port, within the same and different states.

The Federal Rules of Civil Procedure also provide maritime litigants with a procedural advantage unknown in state courts. Under Rule 4(k)(1)(B), service of process may be served within a 100 mile "bulge" of the judicial district in which suit is filed, regardless of state boundaries. This rule has particular application for maritime practitioners on the East Coast of the United States, who can reach from courthouses in New York to ports in Pennsylvania and New Jersey, and for practitioners on the Gulf Coast who can reach between Texas and Louisiana, Louisiana and Mississippi, even Louisiana and Alabama.

Maritime litigation frequently involves the probability of extensive foreign discovery. The need to resort to international treaties governing foreign discovery implicates federal court competence and indicates that state courts cannot claim any advantage over federal courts.

The limitations of discovery in an international dispute where the crew and other witnesses are transient and evidence is moving in commerce all the time, is only one area of special federal affinity to multi-jurisdictional

concerns. Indeed, federal courts are better suited to entertain suits with only passing connection to the venue, because their choice-of-law and jurisprudential doctrines are more firmly established and more cognizant of the concerns of international comity. Having to defend a case in a place remote from the parties, the witnesses and all the other evidence (including the vessel on which the accident allegedly occurred), vastly increases the cost and effort of participating in legal proceedings,[17] but is sometimes appropriate.[18]

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[17] Increased cost and the possibility of not having access to essential evidence – for example, the vessel on which the plaintiff was allegedly injured – may not be the only prejudice suffered by maritime defendants deprived of recourse to the *forum non conveniens* doctrine. While in theory any court is required to apply the same federal maritime law, state courts have been known to substitute for established maritime law their own substantive rules, for instance a generic strict liability statute applied to a maritime tort. *See Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La.), *cert. denied*, ___ U.S. ___ (1992).

[18] In the recent *Waterman Steamship Corp. v. Chubb & Son, Inc.*, 1994 WL 50233 (E.D. La. 1994) decision, the district court refused to dismiss or stay a freight forwarder's declaratory judgment action involving general average. While a parallel action was pending in Egypt, where the ship was grounded, the earlier filed action was brought in the federal forum. None of the cargo originated in Louisiana, and Louisiana's only connection with the cargo claims was an occasional port of call and one of the New York forwarder's many places of business. However, the plaintiffs in the Egyptian proceeding were not Egyptian and were in fact all either American or foreign cargo underwriters trying to avoid obligations imposed by the forwarder's bills of lading and substantive United States law under which at least some of the cargo had been trans-shipped.

In maritime matters, the doctrine of *forum non conveniens* was developed in response to the exceptional scope of the maritime jurisdiction: In view of the plethora of fora in which maritime defendants may be found subject to jurisdiction, a counterbalancing limitation on the exercise of that jurisdiction was necessary to avoid impositions on the courts and the parties. *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 154 (CA2), *cert. denied*, 449 U.S. 890 (1980).

One telling example is the application of *forum non conveniens* analysis where the operative occurrences, the witnesses, and the evidence lie outside the jurisdiction, but the defendant can be found in and haled before the forum. An accident aboard ship in transit between Cartagena and Vera Cruz, involving only Venezuelan cargo, can be brought in the United States if the ship is later found in a U.S. port and the consignor wants to sue here. It may not, however, be appropriate to entertain such a suit in the United States because our courts, state or federal, have no interest in adjudicating such a dispute between foreign nationals, involving only Venezuelan law, and the operative facts of which occurred outside United States waters.[19]

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[19] While this general-average hypothetical is based upon a real occurrence, the case settled early and there was never a ruling on the *forum non conveniens* motion made by the Mexican shipowner. However, international comity and jurisprudential concerns have always counseled for refusing to hear a case without any real connection to the venue in which suit was brought. *Gutierrez v. Diana Investments*, 946 F.2d 455 (CA6 1991) (injured Honduran seaman employed in Honduras by Panamanian corporation based in Greece to work on a Panamanian flag

Several of the states, including Texas, have refused to recognize the doctrine of *forum non conveniens*.[20] The forum shopping necessarily attendant to the conflict between state and federal fora will continue to engender the wasteful procedural jockeying that has already consumed an inordinate amount of judicial time and attention. *See, e.g., Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (CA5 1987), *rev'd on other grounds*, 486 U.S. 140 (1988), *appeal after remand*, 821 S.W.2d 190 (Tex. App. – Houston [14th Dist.] 1991), *writ granted*, 35 Tex. Sup. Ct. J. 684 (1992). There is a grave need for uniform application of the *forum non conveniens* doctrine in maritime cases because of the number of fora in which maritime defendants may be jurisdictionally "found."

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vessel could not avail himself of United States jurisdiction for injuries suffered in Canadian (Great Lakes) waters, even though the vessel spent 20% of its time in United States ports); *Saloman Englander Y Cia, Ltd. v. Israel Discount Bank*, 494 F. Supp. 914, 918 (S.D.N.Y. 1989) (dismissal of suit on Israeli letter of credit because diversity jurisdiction was not intended to extend a forum to a dispute between one alien corporation and another merely present and doing business in the venue).

[20] *See, e.g., Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 677 (Tex. 1990); *Chick Kam Choo v. Exxon Corp.*, 821 S.W.2d 190, 194 (Tex. App. – Houston [14th Dist] 1991), *writ granted*, 35 Tex. Sup. Ct. J. 684 (1992). Under Louisiana law, for another example, only "claims brought pursuant to [the Jones Act,] 46 [U.S.C.] § 688 or federal maritime law" are ineligible for *forum non conveniens* dismissal. La. Code Civ. Proc. Ann. art. 123(C). Maritime defendants are thus singled out and doubly disadvantaged in Louisiana and Texas by being deprived of both the state and federal doctrines of *forum non conveniens* if district courts are allowed to abstain except in exceptional circumstances.

"[F]ederal courts have developed a vast expertise in dealing with the intricacies of federal law, while the state judiciary has, quite naturally, devoted the bulk of its efforts to the evolution and refinement of state law and policy. It would be unreasonable to expect state judiciaries to possess a facility equal to that of the federal courts in adjudicating federal law." Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 75 n.15 (1984) (citations omitted). *See also* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. Rev. 67, 90.

Because the federal courts possess a greater expertise with maritime law, and have more resources available to accommodate the special needs of maritime litigants, the exercise of jurisdiction is mandated in maritime actions brought under the Declaratory Judgment Act. The Court should reject any approach that allows district courts, only nominally constrained by a highly deferential standard of review, to dismiss or stay a properly filed declaratory judgment action absent exceptional circumstances showing that the parallel state court proceeding is demonstrably better suited to settle the parties' dispute. *Moses Cone*, 460 U.S. at 25-26.

CONCLUSION

The decision in this case will affect the availability of declaratory judgments in both marine and non-marine cases. In order to fulfill the purpose for which the Declaratory Judgment Act was passed, the district courts should decide complaints for declaratory judgments and abstain only when there are exceptional circumstances. This rule also requires that appellate courts conduct *de novo* review of decisions to abstain, rather than a cursory examination for abuse of discretion.

Moreover, the Court's decision should recognize that additional factors favor the federal courts' exercise of their jurisdiction in declaratory judgment actions involving maritime matters. In these cases, retention of jurisdiction serves to promote the vital principle of uniformity and utilizes the greater expertise and resources of federal courts.

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